No. 14671

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

GENEVIEVE PIERCE, CARRIE PIERCE MCCOY, ANNA PIERCE, RUTH CARMICHAEL, NEE URTON, MARCUS PETE, JR., AND ELIZABETH PETE, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR THE UNITED STATES

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INDEX

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STATEMENT

In our Opening Brief (pp. 5–18) we presented a fair, complete and accurate statement of the facts pertinent to the understanding and determination of the issues presented on appeal. In contrast appellees' statement of the facts (Appellee's Brief, pp. 2–8) is argumentative and contains many inaccuracies. While in some instances these inaccuracies relate to matters which we believe to be immaterial to the resolution of the issues presented, we feel compelled to state the true facts in some detail to show the lack of validity of appellees' argument, based on their version of the facts, that the Agua Caliente Indians

can obtain justice at the hands of the Government only by intervention by the court in the whole allotment process.

1. *There was no inordinate delay in the making of allotments.*—In their brief (pp. 2–3) appellees refer to the litigation as to the right of the Agua Caliente Indians to receive allotments and state, "No allotments to the Palm Springs Indians were ever made and approved by the Secretary of the Interior until 1949, and then only after a mandamus action had been filed by some fifteen members of the Band against the Secretary in the District Court for the District of Columbia." It is true that after the 1927 allotment proceedings no trust patents had been issued until 1949. But there is no warrant in the facts for any inference that, after the final decision in the *Arenas* case that the Indians were entitled to allotments, the Secretary of the Interior failed or refused to take any action in the premises except under the threat of mandamus. In the first place it should be borne in mind that both the *St. Marie* litigation and the first decision of this Court in the *Arenas* case affirmed the Secretary's decision that no allotments should be made on the Agua Caliente Reservation. *St. Marie* v. *United States,* 24 F. Supp. 237 (S. D. Cal. 1938), affirmed, 108 F. 2d 876 (C. A. 9, 1940), certiorari denied, because petition filed out of time, 311 U. S. 652 (1940); *Arenas* v. *United States,* 137 F. 2d 199 (C. A. 9, 1943), reversed, 322 U. S. 419 (1944). And the subsequent *Arenas* litigation, which established the right of the Indians to allotments, was not concluded until June 9, 1947, when the Supreme Court

denied the petitions for certiorari filed both by the Indian plaintiff and the Government. *Arenas* v. *United States,* 60 F. Supp. 411 (S. D. Cal., 1945), affirmed in part and reversed in part, 158 F. 2d 730 (C. A. 9, 1946), certiorari denied, 331 U. S. 842 (1947). Thus, the only pertinent period, insofar as any charge of inordinate delay by the Secretary is concerned, is the time between June 9, 1947, and February 18, 1949. On the latter date the Secretary directed that trust patents should be issued for allotments as to which there were no conflicting selections (R. 226–227). This delay of substantially less than two years [1] can hardly be termed inordinate, especially since, as the Supreme Court recognized (*Arenas* v. *United States,* 322 U. S. 419, 430 (1944)), "this is no ordinary allotment problem." And least of all can the events which took place during that period lead to any inference that an allotment program was undertaken only as a result of the filing of a mandamus action.

The mandamus complaint was filed on February 16, 1948.[2] The record in the present case reveals that long before that date and ever since the denial of the petitions for writs of certiorari in the *Arenas* case in June, 1947, the allotting of lands on the Agua Caliente Reservation had been given continuous at-

[1] By way of contrast this suit filed by appellees has delayed the completion of the allotment process for almost five years from July 10, 1950, when the suit was filed (R. 16), to June 23, 1955, when appellees' cross-appeal was dismissed on stipulation.

[2] Some time later, after some trust patents had been issued and before any hearing on the merits, the complaint was dismissed without prejudice.

tention in the Department of the Interior (R. 197, 198, 200). It was then agreed that the allotment process should be expedited and that allotments should be made in a manner which would, as far as practicable and feasible, do full justice and equity to the individual members of the band and which would be consistent with existing laws and regulations (R. 198). It cannot be denied that the problem of devising an equitable allotment procedure for the Agua Caliente Reservation (already recognized by the Supreme Court as presenting greater than usual problems) was made more difficult and complicated by many factors including the facts (1) that some few of the 1927 selections were validated as a result of the *Arenas* litigation, while the great majority of such selections were invalidated by the decisions in the *St. Marie* case and *Hatchitt* v. *United States,* 158 F. 2d 754 (C. A. 9, 1946); (2) that only half of the members of the band had made selections in 1927; and (3) that since 1927 there had been a great change of value in the tribal land adjacent to the Palm Springs' city limits (R. 198). For example, some of the lands in Sections 14 and 22, which had been classified as grazing lands in 1927 (thus subject to "C" selections of 40 acres), had greatly increased in value because of the development of lands in adjacent sections so that the selection of these lands in 40-acre tracts would clearly result in inequities and prevent the allotting of lands of approximately equal value (R. 202–203).[3]

[3] The court below found, contrary to the contention of appellees (R. 10–11), that the adoption of this recommendation by the Secretary (R. 210) was not an abuse of discretion in the equitable allotment of the tribal lands (R. 134, Finding No. XXII).

Obviously, the solution of such problems, and there were many, required careful consideration at all departmental levels before any public announcement of the allotment procedure could be made. And that there had been careful consideration of such problems from the time of final decision in the *Arenas* case is manifested by the fact that, after the Secretary directed the Commissioner of Indian Affairs on April 8, 1948, to proceed with the making of allotments in accordance with a broadly outlined plan (R. 194–196),[4] agents of the Government performed much work on the ground (R. 197–209) and on November 5, 1948, were able to request the Indians to make their selections (R. 213; see also Plaintiffs' Exhibits Nos. 19 and 20),[5] all this despite considerable outside interference with the allotment procedure (see Government's Opening Brief, p. 7, fn. 4; see also Plaintiffs' Exhibits Nos. 71, 72, 79, 80, 109).[6] Indeed, counsel for appellees are on record as stating

[4] Appellees conveniently omit reference to the Secretary's instructions of April 8, 1948, in their incomplete statement (Br. 3) as to the actions taken by the Department of the Interior after the filing of the mandamus action.

[5] Plaintiffs' Exhibits Nos. 19 and 20 are not printed in the record on this appeal, and according to the clerk's certificate (R. 161–162) they were not transmitted to this Court as part of the record on appeal, which record included items designated by appellees for purposes of their cross-appeal. However, the exhibits were counterdesignated by the Government in connection with appellees' cross-appeal, and, if the truth or falsity of statements based upon such exhibits is deemed material in any way to the decision on this appeal, it is requested that an opportunity be given to have a supplemental record certified to this Court pursuant to Rule 75 (h), F. R. C. P.

[6] The comment in footnote 5, *supra*, as to Exhibits Nos. 19 and 20 is also applicable to these exhibits.

that the conduct of the government agents in carrying out the allotment instructions has been "punctilious, courteous and cooperative in every respect" (R. 236). Plainly, ever since the final decision in the *Arenas* case the allotting of the reservation has proceeded as expeditiously as the circumstances permitted. An analogy which, we believe, shows that unusual attention has been given this reservation with resulting expedition is the fact that it took 10 years to prepare the definitive 1927 allotment schedule after passage of the 1917 amendment to the Mission Indian Act.

2. *The so-called Clark Schedule was not a selection of allotments by all members of the band.*—In their brief (pp. 3–4) appellees identify Exhibit A to their complaint as the so-called Clark schedule, referred to in the Government's Opening Brief (pp. 8–9), and state that the schedule listed the allotment selections made by all 74 members of the Agua Caliente Band. In its amended answer (R. 75), the Government admitted that plaintiffs, through their attorneys, had filed a schedule of selections for allotments with various government officials, but denied that Exhibit A to the complaint was an accurate copy of said schedule. And the record made in the district court not only demonstrates the propriety of the denial but also reveals many other inaccuracies in appellees' statement. A comparison of Exhibit A to the complaint and the "Clark" schedule (Plaintiffs' Exhibit No. 28 (g) in evidence) will reveal not only a decided variance in the form of the two schedules but also discrepancies in the descriptions of several selections and the complete absence of any selection for allottee

No. 74 on the "Clark" schedule.[7] All these variations are individually of a rather insubstantial nature, but they are indicative of the general inaccuracy of the assertions (see Appellees' Brief, pp. 3–4) that the selections listed had been approved in writing by more than two-thirds of the members of the band and by four of the five members of the tribal committee, and that the selections shown on these schedules were in all cases made by the Indians themselves rather than, as the Government has asserted (Br. 8), in some cases by the attorneys for appellees without the consent or approval of the individual Indians.

Appellees charge that the Government's brief contained false statements, saying (Br. 4) that the statement that the selections in the schedule were made by the attorneys without the consent or the approval of the individual Indian "is untrue". Reference to the pages of the record cited by the Government in support of its statement (R. 41–43, 49–50, 52–55) will show that not only Raymond Welmas and Georgianna Lorene McGlammery[8] but also Augusta Patencio Torro, Ronald Richard Saubel, Albert Welmas, Alena Ramona Welmas, Dora Joyce Welmas, Corrinne

[7] Exhibit A shows selections for only 72 Indians instead of the 74 claimed by appellees because two numbers (43 and 44) are blanks (R. 17–19). Also, Exhibit A lists selections (Nos. 12 and 26) for Larry Norman Hatchitt and Lawrence Pierce, who were not at the time enrolled members of the band (R. 238).

[8] Appellees (Br. 4) also refer to the answer of Richard Amado Miguel. Reference to his answer (R. 42) will show that he admitted having authorized the Preston group to file on his behalf the selections listed for him on Exhibit A to the complaint, but that he alleged that he later repudiated those selections and reaffirmed the selections previously filed with the allotting agent.

Welmas, Glorianne Yvonne Welmas, and Robert Steven Saubel likewise denied that the selections listed for them on Exhibit A had been made by them or by any authorized person on their behalf. For example, the answer of Torro states that she "denies that the selections listed under No. 54 on the schedule of which Exhibit A to the complaint purports to be a copy were made by her, or by anyone authorized to act in her behalf" (R. 49). This serious charge of appellees is thus directly contradicted by the record.

Indeed, the assertion (Br. 3) that all selections listed on the "Clark" schedule were made by the Indians themselves or their parents is of comparatively recent origin and was not made by the person who prepared the schedule at the time of its preparation. When on December 17, 1948, Oliver O. Clark forwarded to the Assistant Secretary of the Interior the written selections of 41 members of the band, he referred to them as "the selections of allotments as made by the members of the Agua Caliente Band of Mission Indians at Palm Springs, in Riverside County, California, represented by us as their attorneys-at-law" (Plaintiffs' Exhibit No. 22). And in referring to the schedule which was to be transmitted under separate cover, he stated that it was "prepared in accordance with information we have as to the selections which have been made *and* which are not in conflict with other selections * * *" (Plaintiffs' Exhibit No. 22).[9] And in forwarding the schedule on January 13, 1949, he referred to it as a "Schedule of allotment selections by *and for* the eligible members" (Plain-

[9] Emphasis is supplied throughout this brief.

tiffs' Exhibit No. 28). There is nowhere to be found any direct, contemporaneous statement that all the selections shown on the Clark schedule were made by the Indians themselves or by their authority. Rather, the guarded language of the transmittal letters, the denials of authorization by various Indians (R. 41–43, 49–50, 52–55), and the fact that signed selections of only 41 members were submitted make it obvious that what happened was that when selections of any Indian filed with the allotting agent were in conflict with the selections filed through the Preston group, a lieu selection was made, without his knowledge or consent, for the allottee who had filed at the agency.

It is likewise clear that the Clark schedule (Plaintiffs' Exhibit No. 28 (g)) could not possibly have been approved by a majority of the adult members of the band or by a majority of the tribal committee on December 17, 1948, as appellees assert (R. 6) and as the schedule itself purports to have been approved.[10] On the evening of December 17, 1948, the tribal committee held a meeting at which Oliver O. Clark presented for approval a document entitled "Schedule of Allotment Selections by Allotees, Agua Caliente, Band of Mission Indians, Palm Springs, California, 1948" (Plaintiffs' Exhibit No. 23; Defendant's Ex-

[10] The asserted approval of the Clark schedule, even if established, is not conceded to be of any materiality in the resolution of the conflicting selections (see R. 221–222), and apparently the court below considered the approval or lack of approval to be immaterial, since it made no finding in the matter and held that the individual defendants were entitled to allotments for those selections as to which there were conflicts with appellees (R. 137–138).

hibit I; Testimony of Lorene (Lena) Welmas, then chairman of tribal committee, reporter's transcript of proceedings, pp. 120, *et seq.*). In a portion of this document headed "Approval of Allotees" there appeared the signatures of 17 members of the band, similar to the signatures on the Clark schedule. This document was in the exact same form as the Clark schedule with separate columns for the name of each Indian and the designation of his 2-acre, 5-acre and 40-acre selection. But both the 5-acre and 40-acre columns were completely blank in all cases and the 2-acre column was filled in in only 14 instances. Thus, it is plain that the four members of the tribal committee approved a schedule which was virtually blank as to the most important information—the selections. The prior approval of the 17 members of the band was in the same category. Obviously, the selections appearing on the Clark schedule and Exhibit A to the complaint were not approved on December 17, 1948, as asserted.[11] We submit, therefore, that the Government's statement (Br. 7–10) as to the various schedules and the administrative action thereon is correct. Particularly do we reiterate (1) that only 41, not all of the members of the band, filed selections through the Preston group; (2) that many selections appear-

[11] It is interesting to note that, when the Preston group under cover of a letter dated December 17, 1948, forwarded to the Secretary of the Interior copies of the 41 selections filed through them, it was stated that the schedule of allotment selections would be transmitted under separate cover (Plaintiffs' Exhibit No. 22). However, the schedule was not transmitted until January 13, 1949 (Plaintiffs' Exhibit No. 28). Query: Why the delay if the schedule had been approved, as claimed?

ing on the Clark schedule were not authorized by the Indians concerned; (3) that 19 of those who filed selections through the Preston group soon repudiated those selections and affirmed prior selections filed with the official allotting agent; (4) that at the time the present action was filed all members of the band except the seven plaintiffs had adjusted their selections and received trust patents; and (5) that before filing or during pendency of this suit the plaintiffs, except Carrie Pierce McCoy, Genevieve Pierce and Anna Pierce, had likewise satisfactorily adjusted their selections.

3. *The facts as to alleged delays in issuance of patents to appellees' nonconflicting selections.*—Appellees (Br. 4–5) charge that the Secretary "failed and refused to approve said non-conflicting selections and to issue trust patents for the lands embraced in said selections to the Indian plaintiffs entitled thereto." This charge is unfair because, as will now be shown, the delay in issuance of the patents was due to the fact that the Secretary accorded them a privilege which they themselves asked for.

The only official schedule on which any selections for appellees appeared was Schedule No. 3 prepared by the allotting agent. Their selections thereon included those portions of their selections appearing on the Clark schedule which were not in conflict and other selections made for them by the allotting agent in lieu of their conflicting selections (R. 232–233). Instead of accepting the selections appearing on Schedule No. 3 or making other selections of their

own they chose to appeal to the Secretary (R. 233). On February 1, 1950, the Secretary held against appellees with respect to their conflicting selections, appearing on the Clark schedule, approved the balance of the selections by other Indians on Schedule No. 2 which had been held in abeyance, also approved some selections by other Indians on Schedule No. 3, and said as to appellees and others similarly situated at the time (R. 26; Plaintiffs' Exhibit No. 57):

> As the Indians (13 in number) for whom the remaining selections appearing on Schedule No. 3 were made have refused to accept those selections and have asked, in the event of a decision adverse to them in this appeal, that they be accorded the right to make for themselves new selections (see Mr. Clark's letter dated July 6, 1949, bottom of p. 8), action on the selections made for them on Schedule No. 3 is suspended in order to afford them that privilege. Accordingly, the case, as to them, is remanded to the Commissioner of Indian Affairs with instructions to cause to be served on each of them (or on the heirs of any deceased Indian) a written notice affording the Indian an opportunity, within not to exceed 10 days from the date of receipt of the notice, either to accept the selection made for them on Schedule No. 3, or to make a lieu selection of other available tribal land. The responses to these notices should be forwarded to the Department for such further action as may appear to be necessary.

The allotting agent by registered mail advised appellees of their rights (R. 27; Plaintiffs' Exhibits Nos. 59,

60, 61, 62 and 63), but their only answer was the filing of this action (R. 27).

And, as pointed out in the Government's Opening Brief (pp. 13–14), none of appellees up to the time of trial in June, 1953, had made the required written request that trust patents for the nonconflicting portions of their selections be issued or that the income therefrom be paid to them (R. 166–167, 172–176, 192–193). Hence, trust patents had not been issued for the nonconflicting portions of their selections because of their own failures and because of the administrative practice of issuing to each allottee but one trust patent covering the three tracts in his allotment (R. 165–166). And appellees cannot deny that, when they made proper written requests after the close of the trial, they seasonably received trust patents dated March 23, 1954, for the nonconflicting portions of their selections, that they have been paid by the Government that portion of advance rentals attributable to the period beginning on March 23, 1954, and that they themselves have been collecting rents due and payable since that date.[12]

4. *The facts as to alleged delay in equalization of allotments and apportionment of water.*—Appellees (Br. 5–6) have also referred to the failures of the government officials to apportion water and equalize allotments and state (Br. 6) that even up to the time this suit was filed "no action had been taken by the

[12] Likewise, they cannot deny that, when they abandoned their cross-appeals and either accepted the selections made for them by the allotting agent or made lieu selections, they received trust patents covering the balance of their allotments.

Bureau or by the Secretary to correct them. Indeed, the appellant expressly or tacitly admits that it has taken no action in respect to the matters mentioned, and in effect argues that all such matters are exclusively within the discretion of the Secretary and that the courts have no jurisdiction to adjudicate the rights of the Indians in respect to the income from allotted lands, or to adjudicate their rights in and to the waters of the reservation, or to equalize the allotments * * *." This statement misrepresents both the facts and the Government's position.

Far from either expressly or tacitly admitting that no action has been taken in respect to the payment of the rental income or the equalization of allotments, we assert that the Government has done everything possible as to these matters within the limitations imposed by the existence of litigation.[13] The failure to apportion water as desired by appellees is more fairly explained by reason of the opinion of the Secretary that such action was not only not necessary to protect the

[13] We have already reiterated (*supra*, pp. 11–13) the facts as to the partial payment of the income, and the reasons for the delay in such payment and for the nonpayment of all of the income claimed by appellees. In our opening brief (pp. 14, 26, 33), we pointed out that the Secretary had recognized the necessity for equalizing allotments and had issued instructions in regard thereto, but had directed that equalization be deferred until after primary allotments had been made to all members of the band. We leave to this court the question whether such deferment of equalization was reasonable. We also point out that since the dismissal of appellees' cross-appeal in June, 1955, and their making of lieu selections for their primary allotments, the matter of procedures for the equalization of allotments as equitably and fairly as possible has been receiving active consideration in the Department of the Interior.

Indians' rights but also not authorized by Congress. See Government's Opening Brief, pp. 15–16, 29–32, 42–44; *infra,* pp. 24–27. There is thus no basis for the view that except for court intervention no action will be taken as to these matters. Our view as to the proper scope of the court's jurisdiction in this connection will be reiterated in the *Argument, infra,* pp. 16–19.

5. *The Government does challenge what appellees call the "Pertinent Findings."*—Appellees (Br. 6–7) quote those portions of the court's findings of fact relating to the income from the nonconflicting selections, the equalization of allotments, and the apportionment of water, and then state (Br. 8):

> The brief of appellant does not challenge the sufficiency of the evidence to support the foregoing and other findings of the District Court. Moreover, the evidence fully supports said findings and appellant's brief tacitly, if not expressly, admits the sufficiency of the evidence in that respect.

This statement, we submit, is not a fair analysis of the Government's opening brief.

A reading of those portions of the findings quoted by appellees (Br. 6–7) will reveal that for the most part they are conclusions of law rather than findings of fact. Indeed, in its conclusions of law the district court repeated these findings almost verbatim (cf. Finding XXIII, R. 135, with Conclusion XII, R. 139–140; Finding XXIV, R. 135–136, with Conclusion XIII, R. 140; and Finding XX, R. 134, with Conclusion XXI). And we so characterized the "findings" (Opening Br. 14, 15, 16, and especially pp. 25–26).

368992—55——3

And, insofar as the quoted portions may be considered as true findings, we did challenge the accuracy of the "findings" that the Secretary was remiss in his duty to equalize allotments and to apportion water (Opening Br. 25–26, 43–44). However, quite reasonably we placed more stress on the inaccuracy of the "findings" with respect to payment of income and apportionment of water as conclusions of law (Opening Br. 36–44). Here again appellees' assertion simply ignores that portion of our brief dealing with these matters.

ARGUMENT

I. The District Court had no jurisdiction to make declarations as to the Indians' rights to an accounting for income, the equalization of allotments, or the apportionment of tribal water

Appellees' answer (Br. 11–18; see also Br. 5–6) to the Government's first point of argument (Government's Opening Br. 21–36) completely ignores the fact that the Government's basic jurisdictional contention is, and has always been, that *under the circumstances here present* the district court had no jurisdiction *under the 1894 Act* to make declarations as to appellees' rights to the accounting for income, the equalization of allotments and the apportionment of water. In other words, appellees' argument completely ignores the very pertinent facts (1) that only portions of their selections had been denied by the Secretary and that the Secretary's action in rejecting these conflicting selections was approved by the court below; (2) that the Secretary had not denied those selections by appellees as to which there were no

conflicts, but rather had issued trust patents therefor as soon as proper request had been made for such action; and (3) that appellees had made no requests for specific lands for equalization purposes, no requests for income, and no requests for a specific allocation of the tribal water (*supra,* pp. 11–15; Government's Opening Br. 10–16, 22–23, 25, 27–33). It is upon these facts, not abstractly or upon some hypothetical facts assumed by appellees (Br. 14), that the question of jurisdiction is to be determined. And the question is the jurisdiction of a suit against the United States under the 1894 Act, not of a mandamus action against a government official or some other form of action.

It is plain that under the facts as they exist appellees' reliance upon "general equitable jurisdiction" is of no avail. It is axiomatic that courts have no jurisdiction to grant relief from administrative action until administrative remedies have been exhausted. *Myers* v. *Bethlehem Corp.,* 303 U. S. 41, 50–52 (1938). Thus, it follows that, since proper requests had not been made to the Secretary for the issuance of trust patents covering the nonconflicting selections, for the payment of income, for equalizing allotments or for the allocation of water, there was no independent basis for adjudication of these issues under the 1894 Act. *Reynolds* v. *United States,* 174 Fed. 212, 213–215 (C. A. 8, 1909).[14] And the adjudication of these

[14] In the *Reynolds* case suit was brought under the 1894 Act to obtain an adjudication in the abstract that plaintiffs were entitled to allotments, they having made no selections of specific lands. The complaint was dismissed without prejudice, the Court saying of the 1894 Act (174 Fed. at pp. 214–215):

matters can not here rest upon "general equity jurisdiction." For, while the court below had jurisdiction to determine appellees' rights to their conflicting selections, such jurisdiction was exhausted when this matter was determined adversely to appellees. There was then no basis for retaining jurisdiction to determine other incidental rights, for in the very nature of things appellees had to return to the administrative agency and make new selections. Until this administrative process is completed, it would be unseemly for a court to interfere in any way. This reasoning, moreover, is in full accord with the principle that the equity court's right to adjudicate incidental issues is limited to those cases in which equitable relief has actually been administered or in which the jurisdiction has been rightfully invoked. 30 C. J. S. Equity, sec. 67, p. 419; 19 Am. Jur., Equity, sec. 132. And in *Arenas* v. *United States,* 197 F. 2d 418, 420 (C. A. 9, 1952), ignored by appellees, this Court held that the authority of an equity court to decide incidental issues did not empower the court to determine Indian heirship.

And there is nothing to the contrary in this Court's opinion in *Arenas* v. *Preston,* 181 F. 2d 62 (C. A.

"We think the proceeding in court was intended as a remedy when the position of the officials is adverse, which does not relieve the claimant of his duty to first localize his claim by a selection of specific land, so that, if final decree is rendered in his favor, all controversy will be at an end, and the Secretary of the Interior can cause a patent to be issued without further inquiry. In *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039 [relied upon by appellees (Br. 13)], which was brought under the Act of August 15, 1894, before the amendment of February 6, 1901, the claimant had made a selection of specific land." Appellees have cited no case to the contrary.

9, 1950), certiorari denied, 340 U. S. 819. In that case Arenas had made a selection which had been denied, so that there was room for the exercise of "general equity jurisdiction" after holding that an allotment had been unlawfully denied. But in the instant case there was not the necessary holding that valid selections had been unlawfully denied. And quite clearly the declarations that appellees were entitled to equalization of allotments, payment of income and apportionment of water can not, as the 1894 Act requires, "have the same effect * * * as if such allotments had been allowed and approved" by the Secretary. For, in each instance further consideration and action is required of the Secretary, as is well illustrated by the retention of jurisdiction to effectuate the judgment in these respects (R. 147–148). We submit therefore that, apart from any other reasons why jurisdiction was lacking,[15] the court below had no jurisdiction to make declarations as to the equalization of allotments, the payment of income or the apportionment of water because these matters had not been properly submitted to the Secretary in the first instance. Moreover, until such submission there can be no "case or controversy" appropriate for submission to a federal court.

[15] In our Opening Brief (pp. 27–33) we set forth additional reasons why the court below had no jurisdiction to make declarations as to the three matters involved in this appeal. Appellees have made no answers to these additional arguments and we submit that there are none.

II. Even assuming the existence of jurisdiction the District Court erred in holding that plaintiffs were entitled to the income derived from the lands included in their nonconflicting allotment selections from the dates of their selections

Whether or not appellees are entitled to the income from the lands included in their nonconflicting selections for the period prior to issuance of trust patents would depend, of course, upon the time at which they acquired the "full" equitable title in the land and the tribe's right was completely extinguished. In our opening brief (pp. 36–38), relying upon the language of the Mission Indian Act of January 12, 1891, 26 Stat. 712, that the issuance of a trust patent shall "separate the individual allotment from the lands held in common," we contended that, no matter what equitable rights appellees had acquired in the lands by virtue of selection,[16] the tribe rather than the individual Indian was entitled to the income for the period prior to issuance of the individual trust patent. We also distinguished the cases on which the district court relied for its holding that full equitable title vested in appellees as of the date of their selections, and cited *United States* v. *Reynolds,* 250 U. S. 104, 108–109 (1919), as authority for our distinction (see Government's Opening Br. 37, 38–42). Appellees pay little regard to the language of the Mission Act (Br. 21–22), brush off the opinion in the *Reynolds*

[16] We did not contend, as appellees assert (Br. 21) "that an Indian can acquire no rights in lawfully selected lands until a trust patent thereto is issued to the Indian." Of course, by virtue of a valid selection the Indian obtained the right that the land not be granted to another, and perhaps many other rights. We merely contended (Br. 38) that the Indian did not receive "full' equitable title until the issuance of the trust patent.

case as merely a holding that a restricted Indian cannot alienate his allotted lands during the trust period (Br. 22), and in a boot-strap argument cite several cases in the line distinguished in the *Reynolds* case as authority for their contention that equitable title to an allotment vests as of the date of selection (Br. 17, 19–20, 23). But the *Reynolds* case cannot be so lightly brushed aside.

The *Reynolds* case is more than a holding that restricted Indian lands cannot be sold during the trust period. In fact, that well established principle of law was not at issue in the case, the question at issue and decided being whether the trust period began with the approval of the allotment or with the issuance of the trust patent (250 U. S. at p. 107).[17] And the holding of the *Reynolds* case clearly is that under the General Allotment Act an Indian's equitable title was not complete upon approval of the allotment by the Secretary, but rather became complete only upon issuance of the trust patent (250 U. S. at pp. 108–

[17] Appellees (Br. 22) recite the facts that in the *Reynolds* case the selection was approved on September 16, 1891, and that the trust patent was issued on February 6, 1892, apparently to show that the difference in time was *de minimus*. The date upon which the Indian made the selection does not appear, but the schedule upon which the selection was listed was dated August 7, 1891. *Reynolds* v. *United States*, 252 Fed. 65, 66 (C. A. 8, 1918). The selection must have been made at some time prior to the latter date. But the interesting factor is that the date of selection, whether it was recent or long past, was not considered to be of any importance in determining when the Indian's equitable title vested (cf. Appellees' Br. 21–22). Moreover, as has been pointed out, *supra*, pp. 11–13, the delay in issuance of trust patents in the instant case was due to appellees' failure to follow the directions of the Secretary and his subordinates.

109). It is conceded that the *Reynolds* case did not involve the right to income, but it did involve the question as to when the equitable title became complete, which should in turn determine the right to income. As the Court of Appeals for the Eighth Circuit said of the *Reynolds* case in *Lemieux* v. *United States,* 15 F. 2d 518, 522 (1926), certiorari denied, 273 U. S. 749:[18]

> While not directly in point here, it is an intimation, at least, that the vesting of rights to lands in such a case does not take place upon the making of a selection or the issuance of a certificate of selection by an agent.

We submit that the *Reynolds* case is more than an intimation, it is a holding that complete equitable title under the General Allotment Act, which is not as clear in this respect as the Mission Indian Act, does not vest until a patent issues.

Likewise of no help to appellees is their quotation (Br. 20) from *Raymond Bear Hill,* 52 L. D. 688, 691 (1929). As indicated by the part of the opinion immediately preceding the quotation, the writer of the opinion was discussing the *general* rule as to the right of a claimant to public lands. However, it was later in the opinion recognized (52 L. D. at p. 692) that the Supreme Court's decision in *United States* v.

[18] It is interesting to note that the cases upon which appellees rely (*First Nat. Bank of Decatur, Nebr.* v. *United States*, 59 F. 2d 367 (C. A. 8, 1932); *United States* v. *Whitmire*, 236 Fed. 474 (C. A. 8, 1916); and *Wallace* v. *Adams*, 143 Fed. 716 (C. A. 8, 1906), affirmed, 204 U. S. 415), were decided by the same court. Obviously, the differences in the applicable allotment statutes must make a difference in the result.

Reynolds, 250 U. S. 104 (1919), must be respected in determining when equitable title to an allotment vested. And the holding that selection alone served to change the status of the land from tribal to individual property under the allotment act there involved could not be made with reference to the Mission Indian Act which specifically provides that only the issuance of the trust patent "shall separate the individual allotment from the lands held in common."

Appellees (Br. 21) also rely upon this Court's decision in *United States* v. *Arenas,* 158 F. 2d 730, 750 (C. A. 9, 1946), certiorari denied, 331 U. S. 842, as authority for the contention that equitable title became vested upon selection. But as pointed out in the Government's Opening Brief (p. 37, fn. 13), that case did not involve the question of a right to income, the main question being whether Arenas was entitled to a trust patent at all, with the effective date of the trust patent being of little or no importance. Moreover, while the 1927 allotment instructions, involved in the *Arenas* case, called for the issuance of a certificate of selection for allotment, there was no such provision in the instructions here involved. Rather, the present instructions provided that the trust patents to be issued "shall be effective as of the date of the issuance thereof" (R. 196; see Government's Opening Br. 37, 41–42). Finally, we submit that the decision in the *Arenas* case is in no sense *res adjudicata* of the present issue, so that if it has the effect claimed by appellees it should not be followed here. Cf. *Arenas* v. *United States,* 197 F. 2d 418, 420–421 (C. A. 9, 1952).

III. Even assuming jurisdiction exists the court erred in holding that it was the duty of the Secretary of the Interior and the United States to apportion or allot the tribal water among the individual Indians

In their third point of argument (Br. 24–30) appellees indiscriminately mingle jurisdictional arguments and arguments on the merits. Their jurisdictional contentions are for the most part based upon factual situations that do not exist, and we shall rest upon what we have already said as to the lack of jurisdiction (*supra,* pp. 16–19; Opening Br. 21–27, 29–32, 33–36), merely reiterating that there have been no complaints from any of the Indians as to the present system of distribution of tribal waters (R. 171–172, 177, 180, 182–183, 259) and that, as the court found (R. 127), the reservation lands are valuable for resort purposes, which value would, of course, preclude agricultural use (cf. Appellees' Brief 24–25, 28).

Contrary to the implication of appellees' assertions (Br. 24, 26, 27), our argument on the merits and also our jurisdictional argument (Opening Br. 29–32, 42–44) can in no sense be characterized as a denial that each Indian is entitled to a fair share of the tribal water, or a contention that the Secretary's discretion under Section 7 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U. S. C. sec. 381, is absolute. We freely admit the right of each Indian to the use of a fair share of the tribal water and the duty of the Secretary to distribute such water equitably when its use is necessary to make the lands available for agricultural purposes. But we do contend that there is no authority, under 25 U. S. C. sec. 381 or any other statute for *apportioning or allotting* the

tribal waters *in specific amounts* among the individual Indians (Opening Br. 29–32) and that the Secretary was not remiss in his duties under 25 U. S. C. sec. 381 in respect to the *distribution* of tribal waters.

Appellees (Br. 28–29) take issue with our distinction between "apportionment" or "allotment" and "distribution," and assert that the dictionary meaning of the words is the same. But regardless of dictionary definitions, which are often of no value in defining terms in Indian land law (cf. *Muskogee County* v. *United States,* 133 F. 2d 61, 64 (C. A. 10, 1943)), the General Allotment Act (of which 25 U. S. C. sec. 381 is the codification of a part) makes it clear that Congress was not using the terms "allotment" and "distribution" as synonomous. Rather, Congress plainly has directed the allotment of lands in the sense of a transfer of title to the Indians, but in section 381 has merely declared a right in each individual allottee of lands to share in the use of tribal water, title to the water rights to remain undisturbed, and has directed the Secretary to see that the water was equally distributed for agricultural purposes.[19]

[19] Obviously, since 25 U. S. C. sec. 381 authorized the Secretary to prescribe rules and regulations for the distribution of water only "where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes," the allotment or even distribution of water cannot be deemed part of the original allotment process (cf. Appellees' Br. 25–28). Congress knew that the condition imposed for action by the Secretary might not arise at all. And if the distribution of water was merely a part of the process of allotting land, there would be no need at all for section 381. Thus, appellees would in effect read the section out of the General Allotment Act. And they would negate the will of Congress to treat the water situation differently from the land itself.

Based upon the assumption that the terms "apportion" and "distribute" are synonomous, appellees (Br. 29) consider the judgment as merely a declaration that the right to a just share of the tribal water is appurtenant to each allotment and that appellees are entitled to have the waters distributed in such manner as will secure to each of them a just share. If that were the effect of the judgment, the Government would not be greatly disturbed. But the judgment did not use the term "apportionment" as synonomous with "distribution." Rather, the court was using "apportionment" in the sense of allotment and grant of title, as is demonstrated by its conclusion of law No. XX (R. 142–143; see also Conclusion XXI, R. 143):

> * * * and whenever it appears that the Secretary has failed or refused to perform this duty or has otherwise abused the discretion thus reposed in him by law, this Court has jurisdiction under 25 U. S. C. sec. 345 to adjudicate the resulting controversy between the Secretary and the allottees, *by decreeing the precise nature and extent of all water rights appurtenant to and accompanying allotments of tribal land;* and such decree "shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him * * * [25 U. S. C. sec. 345; * * *]

And in keeping with their fallacious line of argument appellees have suggested (Br. 5–6) that they might be satisfied with the inclusion in the trust patents of a provision that they were "entitled to just and proper shares of the reservation waters." They

also offered this suggestion in the trial court, but, as we have shown (*supra,* p. 26), the court's judgment is not in any sense an adoption of the suggestion. Moreover, the adoption of such a procedure would present jurisdictional obstacles. Congress has not authorized the inclusion of any such provision in a trust patent, so that neither the Secretary nor the courts could insert such provision even if it were deemed necessary. *Deffeback* v. *Hawke,* 115 U. S. 392, 406 (1885); see Opening Br. 31. And such a provision is not necessary since, even without it, an allottee is nevertheless entitled to his fair and just share of the water. *United States* v. *Powers,* 305 U. S. 527, 531–533 (1939); see Opening Br. 32. Thus, even if the inclusion were authorized, the omission of the provision would not support a finding that the Secretary was remiss in his duty.

The assertion at the end of appellees' brief that, while only a few Indians are here concerned the whole band "as a class" is interested in a judicial declaration concerning income, equalization and apportionment of water (Br. 30) requires comment lest other proceedings in the district court be inadvertently affected. The district court has held that this is not a class action (Conclusions XXI, XXII, R. 143). Appellees' attorneys have sought to join all of the members of the band as parties to supplemental proceedings in the present case claiming attorneys fees (Government's Opening Br. 34–35). Any statement that this is a class action would obviously advance such a claim. We therefore present in the Appendix hereto a statement of the reasons why the district court was

clearly correct in holding that this is not a class action.

CONCLUSION

For the reasons stated herein and in our Opening Brief, it is submitted that the judgment of the district court should be reversed.

Respectfully,

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APPENDIX

Statement of Reasons Why District Court Was Correct in Holding That This Is Not a Class Action

In their quotation of Finding XX (R. 134) appellees (Br. 7) have indicated by asterisks the omission of the following:

> * * * but only a few members of the Band are parties to this action, and it appears that all members, if practicable, should be joined as parties to any action for equitable apportionment of the water rights appurtenant to the allotted lands.

This statement is repeated verbatim in the court's conclusions of law (Conclusion XXI, R. 143) which then continues (Conclusion XXII, R. 143):

> Since plaintiffs here cannot represent the interests of the unjoined members of the Band because of their conflicting claims to allotments [see *Hansberry* v. *Lee,* 311 U. S. 32, 44–45 (1940)] and, the membership being relatively small, all could be joined as parties to an action, there is no basis for considering the case at bar to be a class action [Fed. Rules Civ. Proc., Rule 23 (a), 28 U. S. C. A.].

We will concede that each member of the Agua Caliente Band is vitally interested in the final decision in this litigation, just as any person would be interested in any litigation which as *stare decisis* would have an effect on his property and rights. But we can in no sense agree that each member has the same interest as do the appellees in this case. Indeed, it is clear that the interests of a majority of

the members of the band would lie in the reversal of the present judgment in one or all of its aspects. For example, those Indians who have trust patents for allotments with a comparatively high value, including Genevieve Pierce and Anna Pierce, appellees,[1] would no doubt prefer that there not be any equalization of allotments, but that the income from the remaining tribal lands would continue to be available as the source of monthly per capita payments. Likewise, those Indians still of childbearing age would doubtless prefer that the remaining lands be held for the making of allotments to children to be born in the future, with the result that their family holdings would have a greater increase than would result from equalization. Obviously, there is a conflict of interests flowing from the requirement that allotments be equalized.

It is likewise obvious that there is a conflict of interests with respect to the payment of income derived from allotted lands prior to the issuance of trust patents. It is a fact that each member of the band, including appellees, has received the income from the lands allotted to him or her attributable to the period after the issuance of a trust patent. No Indian has received income for any prior period unless he was, by virtue of a certificate of allotment issued in 1927, in possession of the land allotted to him and was him-

[1] In the petition for Supplemental Decree for Attorneys' Fees and Expenses Advanced, etc., filed by the attorneys for appellees in the district court it is recognized that, even though some allotments are valued far in excess of $100,000.00, it would not be practical to attempt equalization on a higher basis than $100,000.00 (see R. 230–231). Thus, although the petition lists the values of the allotments of Carrie Pierce McCoy, Anna Pierce and Genevieve Pierce at $63,730.00, $128,740.00, and $153,170.00, respectively, it is acknowledged that only Carrie Pierce McCoy would be entitled to a supplemental allotment for purposes of equalization.

self responsible for the production of income. Rather, it may be generally stated that the income derived from the lands prior to the issuance of individual trust patents has either been paid equally to each member of the band, including appellees, in the form of per capita payments, or has, since the filing of this suit been held in escrow pending judicial determination of the matter. The allotment selections were made in November and December, 1948 (R. 128–129). Trust patents were issued to 27 members of the band in February, 1949 (R. 212, 223, 226) and to the remaining members (except appellees Genevieve Pierce, Carrie Pierce McCoy and Anna Pierce) in February, 1950, or comparatively soon thereafter (R. 129–132).[2] Appellees themselves would doubtless have received trust patents in February, 1950, or earlier, if they had chosen to abandon their position, held to be untenable by the court below, as to their conflicting selections. Thus, it is their own fault that their trust patents were not issued at an earlier date (see also *supra,* pp. 11–13). And since appellees have shared equally with the other members of the band the income derived from other allotments from the time of selection to the issuance of trust patents, the other allotees cannot be expected to look with favor upon the holding below, especially when the affirmance of the holding would mean that the per capita payments would have to be reduced, or even eliminated, until appellees had been paid the amount of income derived from their allotments during the period at issue. Plainly, only appellees would gain under the holding as to payment of income.

[2] Trust patents were issued for the other appellees as follows: to Elizabeth Pete on June 29, 1950; to Marcus Pete, Jr., on December 21, 1950; and to Ruth Carmichael, nee Urton, on October 9, 1952 (R. 44–45, 48, 133). The Pierce sisters received patents for their nonconflicting selections on March 23, 1954 (Gov. Br. 14, fn. 14).

It is also plain that there would be no unanimity of opinion with respect to the requirement of the judgment that the tribal waters be apportioned among the individual Indians. Some, if not most, of the members of the band might prefer that the waters of the reservation remain in tribal ownership, with, as in the past, a right in each to the use of his just share. Indeed, 15 members of the band actually joined in making a group selection of lands including the main source of the tribal water, the lands so selected to be held in trust for the benefit of the entire band (R. 220, 224–225, 234). Obviously, these Indians considered it better that the tribal waters be retained in a unitary holding.

Thus, it is clear that the instant case, far from being properly labeled as a class action, presents a sharp conflict of interests between the members of the band as to each of the three questions presented on appeal.

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